82 - 2041

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM 1982

EARL JOHSON,
Petitioner,

VS.

LIBRADO PEREZ, Director Social Services Agency,
Respondent.

On Writ of Certiorari
to the State of California
Court of Appeal
First Appellate District, Division One

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED [1]

1. When the State grants parents generally the right to appeal from a trial court's findings that they have neglected and abused their children, does it violate the Equal Protection and Due Process Clauses for the State to deprive only those parents whose children become eighteen years of age during the pendency of the appeal of a resolution of that appeal?

2. Does the Due Process Clause of the Fourteenth Amendment allow the use of a "preponderance of the evidence" standard to determine whether a father has neglected and abused his children?

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1 List of all parties includes Librado Perez, Director of the Alameda County Social Services Agency, and Tiffany Johson.

3. Is a parent in a child dependency hearing entitled to effective assistance of retained counsel under the Sixth Amendment and did Petitioner's trial counsel render effective assistance?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINION BELOW

During the pendency of Petitioner's appeal, Tiffany Johson, Petitioner's daughter, became eighteen years of age. The Alameda County Superior Court (hereinafter "Juvenile Court") then dismissed its jurisdiction over her. The Court of Appeals, First Appellate District, Division One, entered an Order dismissing Petitioner's appeal with regard to Tiffany on the ground of mootness. The Court of Appeals never entered a written opinion. The oral ruling from the transcript of the Superior Court proceeding appears in Appendix I hereto.

JURISDICTION

The decision of the Court of Appeals was entered on January 17, 1983. A Petition for Hearing was lodged with the California Supreme Court and that Court denied any review of the matter on March 14, 1983. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1257.

STATUTORY PROVISIONS INVOLVED

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws.

STATE OF CALIFORNIA WELFARE AND INSTITUTIONS CODE

> Section 355. At the hearing, the Court shall first consider only the question whether the minor is a person described by Section 300, and for this purpose, any matter or information relevant and material to the circumstances or acts which are alleged to bring him within the jurisdiction of the juvenile court is admissible and may be received in evidence; however, proof by a preponderance of evidence, legally admissible in the trial of civil cases must be adduced to support a finding that the minor is a person

described by Section 300. If the minor is not represented by counsel at the hearing, it shall be deemed that objections that could have been made to the evidence were made.

Section 395. A judgment in a proceeding under Section 300 may be appealed from in the same manner as any final judgment, and any subsequent order may be appealed from as from an order after judgment; but no such order or judgment shall be stayed by the appeal, unless, pending the appeal, suitable provision is made for the maintenance, care, and custody of the person alleged or found to come within the provisions of Section 300, and unless the provision is approved by an order of the juvenile court. The appeal shall have precedence over all other cases in the court to which the appeal is taken.

A judgment or subsequent order entered by a referee shall become appealable whenever proceedings pursuant to Section 252, 253, or 254 have become completed, or, if proceedings pursuant to Section 252, 253, or 254 are not initiated, when the time for initiating the proceedings has expired.

An appellant unable to afford counsel shall be provided a free copy of the transcript.

STATEMENT OF THE CASE

Petitioner, Earl Johson, is the father of Tiffany and Suzanne Johson. From the time of the dissolution of his marriage to their mother until they were removed from his custody by the State of California Superior Court, he raised them, provided for them and had them educated in private schools. Their home was spacious and clean. He set rules and standards for his daughters and expected them to be followed.

On a few occasions over a seven-year period in exercising his authority as a parent over two teenage daughters, he used corporal punishment. On one occasion, he struck his daughters with a leather belt after a particularly trying episode. There were no significant injuries to either child nor had there ever been. Ultimately, Tiffany and Suzanne complained to their school

authorities about their father. The governmental agency responsible for dependent children was called and after a court hearing obtained temporary custody of Petitioner's daughters. Petitioner's daughters simply did not wish to return to live with Petitioner.

On December 4, 1981 a contested jurisdictional hearing was held in the Juvenile Court, Alameda County Superior Court. At that hearing the court determined, first, that Tiffany and Suzanne were dependent children, and second, that they would not be returned to petitioner's spacious home but would continue under foster care provided by the county. With regard to the first determination the court found under California Welfare and Institutions Code §300 that Tiffany and Suzanne had no parent capable of exercising proper and effective care or control and that Petitioner's home

was unfit by reason of physical abuse.

In making these determinations under §300, the Juvenile Court did not indicate which evidentiary standard it was applying. Welfare and Institutions Code §355 cited above mandates a "preponderance of the evidence" standard.[2] In view of this statute and the Juvenile Court's lack of articulation of a standard, it appears the "preponderance" standard was employed.

Petitioner strongly believed he had cared for his children and that his use of infrequent corporal punishment did not make him a child abuser such that his children had to be taken from his custody. His attorney, however, failed to arrange for

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2 Some decisional authority of the Court of Appeals, First Appellate District, has employed a "clear and convincing" standard, Matter of Robert P., 61 Cal.App.3d 310, 132 Cal.Rptr. 5 (1976); In Re Phillip B., 92 Cal.App.3d 796, 156 Cal.Rptr. 48 (1979).

Petitioner's witnesses to testify and agreed with the Court that simply because Tiffany and Suzanne did not choose to return to Petitioner's home, the Court could declare them to be dependent children under Welfare and Institutions Code §300.

Petitioner appealed the Juvenile Court's ruling to the Court of Appeals as provided under Welfare and Institutions Code §395. During the pendency of the appeal Tiffany became eighteen years of age. The Juvenile Court dismissed jurisdiction over her. Tiffany's counsel, the State Public Defender, moved to dismiss the appellate proceedings on the ground of mootness. The Court of Appeals granted the motion. Consequently, Petitioner has never had appellate review of the Juvenile Court's findings that he could not care for Tiffany, that he was a child abuser and that Tiffany could be taken from his custody.

The federal questions were raised in these matters at the Court of Appeals level in the appellate briefs and motions. Appellant's (Petitioner's) Opening Brief, p. 10, raised the due process issue with regard to the evidentiary standard and, p. 25, the effective assistance of counsel issue. Appellant's (Petitioner's) Opposition to the Motion to Dismiss and Appellant's Motion to Reconsider Dismissal by implication raise the Fourteenth Amendment issues.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW FORFEITING PETITIONER'S RIGHT TO AN APPEAL SOLELY BECAUSE OF THE AGE OF HIS CHILD RAISES IMPORTANT ISSUES OF EQUAL PROTECTION IN THE ADMINISTRATION OF DEPENDENCY PROCEEDINGS

California grants a parent whose child has been found to be dependent an absolute right to appeal, California Welfare and Institutions Code §395. Moreover, California attaches special significance to this right to appeal by giving it precedence over all other cases in the appeals court just as it gives criminal cases such precedence.

This Court has on many occasions stated that there is no due process right to an appeal, see Blackledge v. Perry, 417 U.S. 21, 25 (1974), in the criminal process, and Lindsay v. Normet, 405 U.S. 56 (1972), in the civil process. However, it is just as clear that when a state provides appellate review, it cannot be granted to some

litigants and capriciously or arbitrarily denied to others. In Griffin v. Illinois, 351 U.S. 12 (1956), and succeeding cases, this principle outlawed financial and resentencing impediments to appeal. Lindsay, supra, established in a civil context that the states cannot arbitrarily distinguish between different classes of real property litigants in allowing appeals.

Petitioner, by the finding of the Alameda County Juvenile Court, was branded a child abuser. Not only does that label emotionally devastate a parent, it creates far greater shame than that visited on persons convicted of myriad criminal violations. The person convicted of shuffling his feet, Thompson v. City of Louisville, 362 U.S. 199 (1960), does not suffer in his community the stigma attached to the parent who has been found to have abused his children.

California effectively distinguishes in its appellate process between parents of older and younger children. What California gives in Welfare and Institutions Code §395, it takes away only for parents of older children. This case illustrates the capricious distinction allowed by this statute.

Petitioner did everything he could to protect his appeal. He filed the proper notice, requested the preparation of the Reporter's Transcripts and the Clerk's Transcript and filed his appellate briefs. Nevertheless, as soon as his daughter became eighteen years of age the California Court of Appeals ruled he had no right of appeal.

Even under the rationality standard of the Equal Protection Clause, there is no articulable rationale for depriving Petitioner of his right to appeal that the parent of an infant could never lose.

The importance of this issue to Petitioner and to parents throughout the country justifies the grant of certiorari to review the judgment.

II. THIS COURT SHOULD DECIDE WHETHER THE "CLEAR AND CONVINCING" STANDARD SHOULD APPLY TO CHILD DEPENDENCY HEARINGS AS WELL AS TERMINATION HEARINGS

In Santosky v. Kramer, 102 S.Ct. 1388 (1982), this Court held that the Due Process Clause of the Fourteenth Amendment demands that a State may only sever the parent-child relationship by meeting a "clear and convincing" evidentiary standard. The question raised in this case is whether that same standard should apply when the State is seeking to make the child its dependent.

Santosky did not decide this issue but its reasoning argues strongly for this Court to apply the same standard to situations where there is the threshold question whether

the State can intrude in the parent-child relationship.

California creates a two-tier process for resolving dependent children issues. The first tier invovles the determination whether the child is to become a dependent child of the Court, Welfare and Institutions Code §300--that is, whether the state will intrude in the parent-child relationship. That process is at least statutorily governed by the "preponderance of the evidence" standard, Welfare and Institutions Code §355.

Santosky establishes the need to avoid factual errors in determining the parents' right to the companionship, care, custody and management of their children. California allows the State to interfere in the parents' right to the management of their children with a preponderance of the evidence standard. Surely, the State's initial intrusion

into the parenting process should be governed by the same standard it requires to remove the children from custody.

The facts of this case illustrate the need to reduce the risk of factual error. The reason these children were found to be dependent was that they did not want to live in the strict environment created by Petitioner. He did strike them on occasion, but is that enough to be branded a child abuser? Once the State entered the management of Petitioner's children, their desire not to return home satisfied for the Juvenile Court the "clear and convincing standard" required in the disposition phase, the second tier of the dependency hearing.

The fundamental right of parenting justifies the grant of certiorari to require California to show "clear and convincing" evidence before intruding in the management of the parent-child relationship.

III. CERTIORARI SHOULD BE GRANTED TO ESTABLISH IN DEPENDENCY HEARINGS THAT PARENTS ARE ENTITLED TO EFFECTIVE ASSISTANCE OF COUNSEL

Petitioner's retained trial counsel virtually agreed with the Juvenile Court judge that Tiffany should be declared a dependent child if she chose not to live at home, Appendix III. Combined with his failure to call important witnesses, these actions of trial counsel withdrew crucial defenses of Petitioner.

This Court's decision in Cuyler v. Sullivan, 446 U.S. 335, 344 (1980), held that the failure of retained counsel to provide adequate representation in a criminal prosecution violates the Sixth Amendment's guarantee of a right to counsel. Lassiter v. Dept. of Soc. Serv. of Durham County, 452 U.S. 18 (1981), addressed the question as to whether the Due Process Clause required states to appoint counsel in parent-child termination

hearings. It held that Due Process does not require that every indigent parent be appointed counsel but that a case-by-case analysis be conducted, 452 U.S. at 30. Impliedly, there are situations contemplated by Lassiter where Due Process requires the appointment of counsel.

Lassiter, of course, does not decide whether a parent is entitled to adequate representation by retained counsel. However, this Court has never separated the right to counsel from the right to adequate counsel.

> We may assume with confidence that most counsel, whether retained or appointed, will protect the rights of an accused. But experience teaches that, in some cases, retained counsel will not provide adequate representation. The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection.
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> Cuyler, 446 U.S. at 344.

If, as Lassiter holds, Due Process demands the appointment of counsel in some cases, Due Process should also require adequate representation. Petitioner's counsel virtually conceded away the custody of Petitioner's children.

This Court should grant certiorari to establish the principle that Due Process is violated by inadequate representation in dependency hearings.

CONCLUSION

WHEREFORE, Petitioner prays that this Court grant his Petition for Certiorari.

Respectfully submitted,

ALAN B. EXELROD

APPENDIX I

COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIRST APPELLATE DISTRICT
DIVISION ONE

In re Tiffany Johson, et al., minors, Librado Perez, Dir. Soc. Serv. Agcy., Plaintiff and Respondent, vs. Earl R. Johson, Objector and Appellant.	No. A016106 Alameda Superior Court No. 113758

BY THE COURT:

The motion to dismiss appeal as moot is granted and the appeal as it applies to Tiffany Johson, only, is dismissed as moot.

Dated Jan. 17, 1983

ELKINGTON, J. ACTING P.J.

APPENDIX II

TRANSCRIPT FROM CONTESTED JURISDICTIONAL HEARING IN RE MATTER OF TIFFANY JOHSON AND SUZANNE JOHSON, NOS. 113758 AND 113759, STATE OF CALIFORNIA, COUNTY OF ALAMEDA, JUVENILE COURT, HONORABLE WILMONT SWEENEY

PP. 83-85:

THE COURT: I believe I am duty bound to make the finding based upon the evidence here. And consequently, the Court does find the petition to be true as to both 300(a) and 300(d).

I have seen far worse cases of physical abuse. This was not as serious as many that I have come in contact with but I think it clearly falls within the definition of physical abuse.

And the Court so finds.

In making the finding of 300(d), the Court finds that each of the sub-allegations are true.

What has been pointed out, Mr. Johson, is, of course, that both of these girls are up in age. One will be 18 very soon and the other shortlythereafter. They are of an age where the Court can order them into your home if it wants toand if the situation isn't right in that home, the Court believes the system will be busy bringing them back and forth from one place to the other. I have no inclination of certainly at this time ordering them back into the situation that the evidence tells me currently exists.

I think it is necessary for both the parent and the children to understand that each one has responsibilities that they owe to the other. And some of your conduct, as has been presented to this Court through the evidence, has, in the judgment of this Court, purely been excessive.

I believe from the testimony that I have heard from the father that the children have been far less than model children.

I don't think that your misbehaviour justified the kind of counteracts that you received, but you could have made things a whole lot better in that house if you had acted a little differently.

I am certainly pleased with the fact that you both appear to be quite bright. And I am sure there has to be something in addition to a natural gift there. That is some suggestion to me that somebody has pressed you to try to induce you to use the fullest capacities that you have.

And I see so many kids where that has not been done, where they have come from homes where the parents didn't have it, and they didn't push them to use that which they had, and they wind up in the gutter.

You are not destined to wind up in the gutter. I think you should recognize one of the reasons is somebody or somebodies have been insisting that you utilize that which you have got.

I think all of you love each other but I don't think you are ready to be together right now. I think you will work it out if you have the intelligence that I am confident all three of you have.

What is the recommendation? Put it over for a report?

APPENDIX III

TRANSCRIPT FROM CONTESTED JURISDICTIONAL HEARING IN RE MATTER OF TIFFANY JOHSON AND SUZANNE JOHSON, NOS. 113758 AND 113759, STATE OF CALIFORNIA, COUNTY OF ALAMEDA, JUVENILE COURT, HONORABLE WILMONT SWEENEY

P. 80:

THE COURT: All right. Do you wish to argue?

MR. LEVINSON: Very briefly.

Only really primarily insofar as the allegation of the 300(d) is concerned.

I think the evidence presents probably more than a sufficient case for the 300(a) part of the petition. But I believe that would be sufficient based on the fact that the minors have no desire to return to the family home.

And given their age, I doubt that the Court could really force them to. You could always send them back home but they would be free to leave if they wished, one way or

the other.

So realistically, I don't think we can make them go back home.